88-1517

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

Docket No. _____

==========

In the Supreme Court of the United States

In the Term of the Court for 1988-9

On Appeal from the United States Court of Appeals For the Fourth Circuit in Case Number 88-2074

ROBERT SCOTT DUNNING,
Petitioner-Appellant
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

Jurisdictional Statement

Robert Scott Dunning
36 Adriatic Avenue
Hampton, Virginia 23664
(804) 850 1918
(804) 865 4591 (NASA)
Petitioner pro se

33 pp

I

Questions Presented

The case which taxpayer petitions for re-examination involves the IRS disallowance of business deductions for an artist in the early years of his business under Section 183 of the tax code, in which the taxpayer argues that the IRS improperly and arbitrarily classified the business as a hobby when it was actually a serious business and professional activity. This petition is respectfully submitted to the Supreme Court to raise the following issues:

1. The Appeals Court premised its decision on the assumption that the Statutory Notice of Deficiency supplied by the IRS in the case was "presumptively correct" and that the Tax Court had upheld

the presumptive correctness of this document. The Tax Court itself rejected the presumptive correctness of the IRS Notice of Deficiency. The requirements of the law under Section 183 of the U.S. Tax Code are questioned with respect to the validity of a Statutory Notice of Deficiency and the associated presumptive correctness of such a notice absent due diligence by the IRS in issuing the notice and in the total absence of any attempt to support the notice before the Tax Court.

2. The position of the Tax Court which the Appeals Court has now affirmed, if allowed to stand, results in an inconsistency in the application of the law under Section 183 setting a different standard of compliance with this law between different taxpayers and between taxpayers and the IRS. The present ruling raises the question of whether IRS and the

Tax Court are exempt from compliance with the major provisions of the tax code while at the same time setting an arbitrary and, in the instant case, impossible standard of compliance for the taxpayer.

3. A Constitutional question is involved in this case with respect to Article II, Section 3. of the Constitution of the United States which requires the president, and therefore the Executive Branch which includes the IRS, to "...take Care that the Laws be faithfully executed,..." The question before the Court in this case is whether agencies of the Executive Branch are required to honor the major provisions of the laws they administer by mandate.

4. An important issue is raised as to whether a court is required, absent any extaordinary circumstance, to base its

rulings on the case that is actually presented to the court by the litigant, and particularly a federal agency, or whether, absent such circumstances, the court is empowered to substitute a case of its own invention and then to rule on the substituted case.

5. A question is raised with regard to orderly proceeding in court cases. The question raised here is whether a court judgment can do service for a required administrative judgment of an agency of the Executive Branch when the executive agency has failed to bring a proper case under given legislation by willfully failing to observe the precepts of that same legislation.

6. With regard to the previous item, a Constitutional question is involved under Article V of the Bill of

Rights which requires due process of law before property can be taken from any citizen for public use. The question here is: Does mere accusation by the IRS without compliance with Congressionally mandated procedures constitute due process?

7. A question of uniform administration of justice is involved with respect to the "presumed correctness" of a Statutory Notice of Deficiency which is fundamental to the administration of the Tax Code. If the opinion of the Tax Court in the instant case is allowed to stand; then newly enacted legislation with regard to the "Taxpayer's Bill of Rights" is fundamentally at odds with court interpretation of other legislation. The Supreme Court will doubtless wish to set standards that it will follow in implementing the intent of Congress with regard to "presum-

ed correctness."

8. The ruling of the Tax Court in this case sets up a double standard for the deductability of travel expenses for professional activities, granting it capriciously to some professions but not to others. If allowed to stand this ruling will have a wide-ranging social impact. The question is raised as to whether such a standard, imposed solely for the administrative convenience of the IRS and clearly never the intent of any Congressional legislation, constitutes de facto legislation by the Executive Branch.

9. The ruling of the lower courts presents a question of whether the IRS is allowed under law to discriminate against a particular profession, artists in the particular example but not by its nature limited to that one profession,

extending beyond the particular taxpayer in this case. As a result of the precedent of discrimination against art and artists that it establishes; all artists in the United States will be placed at a particular disadvantage with respect to the Tax Code. The Supreme Court will doubtless wish to give thoughtful consideration to a decision that effectively relegates over 90% of the professional graphic artists in the United States to "hobbiest" status and deprives them, contrary to the intent of Congress, of the benefits under law readily accorded other, similar, business and professional activities.

10. A question is raised as to whether the Appeals Court can invoke a different basis for affirming a decision of the Tax Court than the basis on which the Tax Court originally stated the

opinion. A question is raised as to the legality of such invocation which the Supreme Court may wish to decide.

11. The question of thoroughness in the court system is raised. Specifically, can any court system maintain public respect if it blandly ignores the uncontested facts of a case, makes numerous factual errors of substance; and bases its fundamental decisional processes on the personal biases of the judges? A question of due process is also raised around this issue which involves the constitutional adequacy and authority of the Tax Court system itself within the Executive Branch. The question raised here is: Does the extensive power of the IRS in administration, interpretation, and adjudication of the tax code violate the concept of separation of powers?

II

Parties to the Proceeding

The formal parties to this proceeding include:

ROBERT SCOTT DUNNING,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

— III

Table of Contents

I. Questions Presented..... 1.

II. Parties to the Dispute..... 9.

III. Table of Contents..... 10.

IV. Reference to Reports..... 11.

V. Grounds Invoked..... 12.

VI. Constitutional Provisions..... 13.

VII. Concise Statement of the Case. 14.

VIII. Importance of the Case..... 27.

IX. Appendix..... 30.

IV

Reference to Reports

No unofficial documents relating to this case have been made public although the IRS doubtless has many such documents. A Freedom of Information/Privacy Act request to the IRS was sidestepped in 1978. The official documents are part of the Tax Court record and are included with that record.

V

(1) Nature of proceeding and Court jurisdiction-- This case is brought under the Internal Revenue Code of 1954 (26 U.S.C.) and in particular, Sections 162 and 183 of that code. The jurisdiction of the Federal Court system arises from Article XVI of the Constitution granting to Congress the right tax income and from

Article III Section 2 which grants jurisdiction to the federal courts in disputes arising from the tax laws enacted by the Congress.

(2) Entry of judgment-- The Appeals Court Judgment in this case was entered by the Appeals Court for the Fourth Circuit on October 20, 1988. A petition for rehearing with a suggestion for EN Bank review was denied and filed by the Clerk of that Court on November 22, 1988. A Notice of Appeal was filed by mail on December 9, 1988 in the Court of Appeals for the Fourth Circuit in Richmond, Virginia.

(3) Statutory provision-- The statutory provision believed to confer jurisdiction on the Supreme Court in this case is believed to be in Article III Section 2 of the Constitution of the

United States as cited above.

VI

Constitutional Provisions

The Constitutional provision under which this case is brought is believed to reside in Article XVI of the Constitution which states:

'The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.'

Under this provision of the Constitution the case is brought under implementing legislation by the Congress, Specifically U.S.C. 26 sections 162 and 183 but including other legislation as ap-

plicable. Pertinent parts of Section 162 and 183 are supplied as an appendix to this document.

VII

Concise Statement of the Case

Mr. Robert Scott Dunning is a professional artist living and practicing his profession in Hampton Virginia. He also maintains a sales office and studio in nearby Virginia Beach, Virginia. Mr. Dunning is employed in the painting of portraits in oil although he is active in other media as well. He is self employed in this activity and strives to produce art which is of a technical quality suitable for museums. That is, his oil paintings, under normal museum conditions are expected to last over 400 years. The prices that Mr. Dunning charges for his

work are in keeping with their expected quality; that is, they are unusually high by normal sidewalk artist standards but are not out of keeping with the norms of serious portraiture.

As a consequence, Mr. Dunning sells his paintings infrequently. It should be noted, however, that in this respect Mr. Dunning is not out of keeping with the standards of his profession. In the United States only about 2%, or approximately four hundred professional artists out of 20,000, are able to support themselves primarily from their art. Mr. Dunning derives his main financial support by working as a research scientist for the National Aeronautics and Space Administration. In this respect he differs from most professional artists only in the discrepancy between the income that his secondary profession affords him and the

much lower income that he receives from his primary profession. Notwithstanding this, Mr. Dunning does consider that his profession as an artist is his primary profession; and to that end he strives to conduct it in a business-like manner with the intention of ultimately making a respectable living from it. He devotes far more time to his artistic career than he does to his scientific career.

In the instant case the IRS has ruled that Mr. Dunning's artistic activities are actually a hobby instead of a profession and has rejected other related deductions. This ruling was undertaken by the IRS without any investigation of the facts whatsoever. In addition this ruling was made in the face of essentially complete justification of the serious, professional nature of Mr. Dunning's business. It has been the contention of

the artist in both the Tax Court and the Appeals Court that the IRS should justify any adverse ruling by both investigation of the facts pertinent to the case and by citing pertinent sections of applicable law. This the IRS has utterly failed to do. The IRS has simply asserted, without evidence, that Mr. Dunning is not in business to make a profit and shifted the burden of proof to Mr. Dunning if he wishes to prove otherwise. Mr. Dunning has been able to substantiate all of his claims. Nevertheless, the IRS, the Tax Court and the Appeals Court have ruled against him.

The IRS rejected Mr. Dunning's legitimate and normal business expenses based solely on the incorrect assumption that Mr. Dunning is not really in business to make a profit. Mr. Dunning's contention is that the desire to make a profit

is only one of a number of criteria which are spelled out under Section 183 of the Internal Revenue Code and which should have been used; and that the desire to make a profit, although an important consideration, is in itself not the sole governing criteria for determination of the bonafide nature of a business. It is further contended that the ruling of the IRS does not adequately take into account Mr. Dunning's realistic plans for the development of his business in a fashion intended to maximize his profit. In essence, the IRS, by demanding instant profit to satisfy its unrealistic criteria for acceptance of a business activity as legitimate, has dictated the manner in which Mr. Dunning must run his business --a manner inconsistent with the inherent nature of the business. It is Mr. Dunning's contention that he is in business to make as much profit from his artistic

activities as possible in the long run and that it is his perrogative to determine the timing of his business moves and the types of business decisions which must be made to achieve that profit objective. Further, it is the contention of Mr. Dunning that his artistic activities have been conducted in a businesslike manner differing only from any other professional, business activity in the false perception by the IRS that artistic activity, which involves an element of pleasure, is somehow different and less of a business activity for that reason. It is the contention of Mr. Dunning that the IRS is in error on this point since Mr. Dunning's secondary activity, namely scientific research, is an equally pleasurable activity when properly pursued. However, in the case of scientific research, the IRS finds no difficulty on this point simply on the basis of the perceptions of its own

officials as the the relative pleasurability of the two enterprises. It is Mr. Dunning's contention that it is an unjustifiable and outrageous presumption on the part of the IRS to base its criteria for the deductablilty of business expenses on its own subjective preferences as to the degree of pleasure attached to a business.

A fundamental principle of justice in the United States is that federal agencies are required to perform the duties of their mandate in accord with the laws, rules, regulations and other requirements that the Congress establishes or which the courts lay down in their rulings; and that when an agency willfully declines to follow these requirements, the fruits of this willful disregard do not have the same standing in court as would these same results had the law been fol-

lowed. This principle finds justification in Article II of the Constitution which requires the president to "...take Care that the laws be faithfully executed,..." U.S.C. 26 Section 183(c) prescribes what must be done to determine if a business is engaged in for profit or not. Under this section the IRS and the Courts are required to give consideration to all of the pertinent factors in a case before arriving at a determination. Consideration of all pertinent factors is mandatory and the law requires that this consideration be fair. In addition this section also states that no single one of the nine factors is determinative. That is the IRS must not base its determination on one of the factors to the exclusion of the others. These requirements are separate from each other. That is:

1. **All** pertinent factors must be considered.

2. No one of the factors determines the outcome.

In issuing its Notice of Deficiency the IRS did not follow either of these directives. It based its issuance of the Notice of Deficiency on one factor only --the absence of profit in three early years of the business. It did not consider the other factors; and it did not even gather the information necessary to form conclusions about several of the factors. The Tax Court rejected the Notice of Deficiency at the beginning of the trial and never referred to it afterward. The IRS confined its written submissions concerning the case to the following items: the tax returns themselves, the "Notice of Deficiency"; and a bland statement of "agreed to facts".

None of these documents addressed compliance with the 183(c) requirements. Counsel for the IRS made no effort to establish that 183(c) had been followed. Finally, the factual errors in the answer brief filed to the Appeals Court for the Commissioner of the Revenue, written long after the Tax Court opinion was rendered, leaves no doubt whatsoever that the IRS was not and has not been in posession of the information needed to reach a conclusion with regard to 183(c). The IRS simply never followed the procedures required by law under the tax code!

It follows that the statement in the Notice of Deficiency regarding whether or not Mr. Dunning was in business to make a profit is nothing except unsupported allegation. The remaining items in dispute on the Notice of Deficiency all would have been permissible business expenditures if

Mr. Dunning prevailed on Section 183.

Finally, since there was no "presumption of correctness" in this chief issue before the Tax Court and all of the other disputed issues depended on the outcome of that issue, the entire Notice of Deficiency was improper. In law the document which the IRS characterized as a "Notice of Deficiency" was nothing more than an unsupported allegation. Nowhere in the history of jurisprudence is unsupported allegation accorded the status of being "presumptively correct".

This Appeals Court for the Washington Circuit, citing SEC v. Chenery Corp., 318 U.S. 80 (1943), has previously stressed that an "administrative agency must defend its decision in court on the same basis as it gave for the decision itself" Lanphear v. Prokop, 703 F.2d

1311, 1317, n. 39 (D.C. Cir.1983). This is so, because "[i]f an order is valid only as a determination of policy or judgement which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment" *SEC* v. Chenery Corp., 318 U.S. 80, 88 (1943).

According to this precedent a court is required to base its findings on the law and the evidence before the court. It cannot simply substitute its own judicial judgment for an administrative judgement required of the IRS when the IRS fails to follow the fundamental requirements of the law under which it brings the case --the instructions in law as to how the determination is to be made. It is axiomatic that the Tax Court in sitting cannot possibly conduct an exhaustive tax

audit. In the instant case the only admissible evidence was the testimony of the taxpayer and his witness. The Tax Court recognized this fact in its bench opinion. However, it totally ignored this same fact in the body of the opinion itself. The Court at its own discretion did not elect to leave the record open for clarification or enlargement. It must only be assumed that the Court was satisfied with the evidence that was presented by the taxpayer --however incomplete that evidence might have been.

In this case the Tax Court did not believe the taxpayer and ruled against him even though all of the evidence before the court was in his favor. Taxpayer subsequently appealed the case to the Court of Appeals for the Fourth Circuit. After the filing of briefs and a detailed reply by Mr. Dunning to each and every issue raised

by the IRS, the Appeals Court rendered a two sentence affirmation of the Tax Court Decision; based, however, on grounds that the Tax Court itself had rejected. It supported a "presumption of correctness" to the IRS Statutory Notice of Deficiency. Clearly, the Appeals Court did not give the case the careful consideration normally expected of a higher court. Consequently, Mr. Dunning filed a Petition for Rehearing with a suggestion for an En Banc review with the Appeals Court which that court subsequently rejected, bringing the case to the Supreme Court in the current Appeal.

IX

Importance

This case is of considerable importance to the United States for a number of social as well as legal reasons.

The implications for art and artists boil down to a simple demand for justice under the law. Historically, the IRS has a record of discrimination against artists which cries out for rectification by the courts. Succinctly, the IRS approaches its dealings with artists from a bias which assumes that art is practiced in the United States simply as a tax dodge and that, therefore, all artists who do not make money immediately out of their art are tax cheats. This fundamental attitude precludes fair administration of the tax laws where artists are concerned. Artists, in turn, are forced to cut corners with their art in an effort to produce work fast enough and saleable enough to satisfy the IRS. Is it any surprise then that the great potential of the United States in art goes unrealized?

Legally the major question before the Court is of equal importance. That question revolves around the traditional belief in the United States that every legal entity be it a person, an institution, or a government agency, should stand before a court as equals in law. In this case, a double standard favoring a government agency stands nakedly exposed. The lower courts have simply asserted that the IRS need not bother to adhere to the tax code in the process of enforcing that code while the taxpayer must not only adhere to it; but must do so to the level of an impossible standard of proof. It should be remembered that all of the evidence in this case favored the taxpayer. The IRS never bothered to even make a case before the Court.

In the case presented here the issue of Executive versus Judicial responsibility is also of sufficient importance to justify consideration by the Supreme Court. Since the IRS clearly did not carry out its mandate in performing a tax audit, the Tax Court effectively performed the audit for the IRS. It did this even though it is simply not structured to perform this function. As a consequence, it failed miserably at getting its facts straight. In the past, the lower courts, specifically the Court of Appeals for the D.C. Circuit, have held that it is not their duty to perform mandated Executive Agency functions when the Executive Agency fails to perform that function. On the other hand, the Appeals Court for the 4'th Circuit, here repudiates that concept.

Respectfully Submitted,

Robert Scott Dunning

(Artist)

Appendix

The Appendix to this Jurisdictional Statement contains documents on larger sheets than are used in preparing this document. Accordingly, the Appendix is bound separately. The Appendix contains copies of the following documents:

1. Appeals Court, 4'th Circuit, denial of petition for rehearing.

2. Appeals Court Judgement.

3. Tax Court bench opinion.

4. Notice of Appeal filed with Appeals Court

5. Notice of Appeal filed with Tax Court

6. Copy of IRS regulations, U.S.C. 26 Section 183 as supplied to the Appeals Court by the Justice Department for the Commissioner. (Determination of intent to make a profit guidlines.)

FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1517

Docket No. _____

==========

In the Supreme Court of the United States

In the Term of the Court for October 1988

On Appeal from the United States Court
of Appeals For the Fourth Circuit

ROBERT SCOTT DUNNING,
Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee

Jurisdictional Statement
Appendix

Robert Scott Dunning
36 Adriatic Avenue
Hampton, Virginia 23664
(804) 850 1918
(804) 864 6499 (NASA)
Petitioner pro se

Appendix

The Appendix to this Jurisdictional Statement originally contained documents on larger sheets than were used in preparing this the body of the Statement. Accordingly, the Appendix was bound separately. Upon submission it was discovered that the format preferred by the Court was to reprint the material in conformity with the page size of the main document. Accordingly, this appendix is resubmitted using the smaller page size. Item 5. is retained in order to be in conformity with the Appendix listing in the main body. The document, however, is not printed under this heading as it is not among the documents needed for this appendix and would be superfluous.

The Appendix contains copies of the following documents:

1. Appeals Court, 4'th Circuit, denial of petition for rehearing.

2. Appeals Court Judgement.

3. Tax Court bench opinion.

4. Notice of Appeal filed with Appeals Court.

5. Notice of Appeal filed with Tax Court (Omitted).

6. Copy of IRS regulations, U.S.C. 26 Section 183 as supplied to the Appeals Court by the Justice Department for the Commissioner. (Determination of intent to make a profit guidlines.)

1. Appeals Court, 4'th Circuit, denial of petition for rehearing.

FILED
NOV 22 1988
U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 88-2074

ROBERT SCOTT DUNNING,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The petitioner's pro se petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that

it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Russell and Judge Sprouse.

For the Court

JOHN M. GREACEN

CLERK

2. Appeals Court Judgement.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 88-2074

ROBERT SCOTT DUNNING,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

Submitted: May 25, 1988
Decided: October 20, 1988

Before RUSSELL, SPROUSE, and CHAPMAN, Circuit Judges.

Robert Scott Dunning, Appellent Pro. Se.
Gary R. Allen, William S. Rose, Jr. (UNITED STATES DEPARTMENT OF JUSTICE) for Appellee

PER CURIAM:

A review of the record, the opinion of the Tax Court, and the informal briefs submitted by the parties to this appeal reveals that the Tax Court's determination that Dunning failed to rebut the presumption of correctness that attaches to an IRS deficiency notice was proper. We accordingly affirm the decision of the Tax Court based on its reasoning. Dunning v. Commissioner of Internal Revenue, TC No. 18206-87 (Dec. 23, 1987).

Because the facts and legal contentions are adequately developed in the materials before the Court and oral argument would not aid in the decisional process, we dispense with argument in his case.

AFFIRMED.

3. Tax Court bench opinion.

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

December 21, 1987

ROBERT SCOTT DUNNING,	)	
Petitioner,	)	
v.	)	Docket No.
	)	18206-87
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent	)	

Notice of Service of Transcript

Pursuant to Rule 152(b), Rules of Practice and Procedure of this Court, there is transmitted herewith to Robert Scott Dunning and respondent a copy of the pages of the transcript of the trial at

Richmond, Virginia on November 18, 1987, containing his oral findings of fact and opinion rendered at the conclusion of the trial.

In accordance with the oral findings of fact and opinion, decision will be rendered for the respondent.

Charles S. Casazza
Clerk of the Court

Bench Opinion by Judge Peterson

November 18, 1987

Robert Scott Dunning

Docket NO. 18206-87

The Court has decided to render oral findings of fact and opinion in this case and the following represents the Court's oral findings of fact and opinion.

Respondent determined deficiencies in petitioner's federal income taxes for the taxable years 1982, 1983 and 1984 in the amounts of $3,949.25, $5,159, and $6,584, respectively.

In addition, respondent determined additions to tax under section 6653(a)(1) in the amounts of $197.46, $257.95 and $329.90, respectively: Section 6653(a)(2) in the amount of 50 percent of the statu-

tory interest due on the above deficiencies; and Section 6661 in the amounts of $515.90 and $6,580.40 for the taxable years 1983 and 1984, respectively.

The only issue involved is whether petitioner's activity as a portrait painter was an activity not engaged in for profit for the taxable years 1982, 1983 and 1984, and in addition whether petitioner is entitled to a deduction for legal fees in excess of $6,360 as allowed by respondent for 1982, a deduction for auto tags in the amount of $70, and for excise taxes on airline tickets in the amount of $230.77 for 1983.

Petitioner has conceded he received $120 of interest income he failed to report for the year 1984.

Petitioner contends that he was in the business of being a portrait painter commencing in 1980. Petitioner admits that prior to this date his artistic

skills had not reached the level necessary to paint for profit.

Petitioner contends his intent was to paint for the long run. He hoped to accumulate an inventory that would be available for sale in the future. Petitioner hoped to paint so that his work would last for 400 years. To accomplish this objective, he purchased the highest quality of paints and materials needed to make long-lasting portraits.

Petitioner painted primarily from photos he took of his subjects. Petitioner's primary efforts to sell his paintings began in 1984. Petitioner had no gallery to show his paintings except he made arrangements in the lobby of his condominium complex to show his pieces of art.

Prior to 1984, his work was shown at his place of employment with the National Aeronautics and Space Administration and

at various outdoor art shows.

During the years involved petitioner painted approximately 20 hours per week, producing five to ten large pieces measuring in size 20 by 24 inches, and five to ten smaller pieces measuring in size 12 inches by 14 inches.

Petitioner contends it was necessary to fly to London to obtain art materials. also, petitioner felt it was necessary to go to Florida to obtain materials.

Petitioner claimed the following net losses from his portrait painting activity: 1980, $9,603.17; 1981, $3,328.17; 1982, $12,207.85; 1983, $14,651.56; 1984, $24,617.14. Petitioner had no sales of his art work for 1982, one sale for $500 during the year 1983, and no sales for 1984.

Petitioner did not investigate his potential for profit from painting portraits except he felt that if his paint-

ings could be sold for $10,000 or more he would eventually have a profit. Petitioner's position is that his object was for long-term results.

For the years 1982, 1983 and 1984, petitioner claimed a deduction for cost of goods sold in the amounts of $2,200, $3,044.68 and $1,914.96, respectively. Petitioner admitted at the trial that the deductions claimed were in error.

Petitioner claimed a deduction for each of the years involved for car and truck expenses without keeping supporting records. Petitioner's deductions were based on estimates. Some of the expenses claimed were for travel away from home. On these occasions petitioner failed to keep records to show places of travel, purpose, time, and amounts involved.

Petitioner claimed a deduction for each of the years involved for use of his personal apartment as an art studio.

Petitioner failed to support the amount claimed and admitted that it was based on an estimate.

Petitioner claimed a deduction for travel expenses to Florida and to Europe but failed to show that the expenses were ordinary and necessary.

Petitioner testified that he went to Europe to visit art museums and to see the work of the masters. Petitioner's travel to Florida was made during Easter holidays when he visited with his friend. Petitioner also took various photos while in Florida and painted some portraits from such photos.

Petitioner claimed a depreciation deduction for a computer which he testified was needed in his art activity. Petitioner did not produce any art work for sale from his computer.

Petitioner also claimed a depreciation deduction for a motorcycle petitioner contends was needed in his art activity petitioner contends was needed to travel to Virginia Beach, Virginia where he had a condominium and kept his art work.

During 1982 petitioner deducted as a business expense a real estate commission for the amount of $4,195 paid when he acquired a condominium.

Also he deducted $4,828.69 for federal income taxes paid after a dispute with the Internal Revenue Service.

For each of the years petitioner also deducted amounts for office expenses, supplies, utilities and other miscellaneous expenses. Petitioner did not keep formal records to support these deductions. Petitioner's records were limited to checks and invoices with various notations which are inconclusive as it pertains to the

various deductions claimed.

Section 183(a) provides that if an activity is not engaged in for profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in the section.

Section 183(c) defines an activity not engaged in for profit as any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under Paragraph One or Two of Section 212.

In determining whether an activity is one engaged in for profit, petitioners must show that they engaged in the activity with an actual and honest objective of making a profit. Surloff v. Commissioner, 81 T.C. 210 at 233 (1983). Dreicer v. Commissioner, 78 T.C. 642, 644, 2645 (1982), affirmed without published opinion 702 F.2d 1205 D.C. Circuit (1983).

The taxpayer's expectation need not be a reasonable one but there must be a good faith objective of making a profit. Section 1.183-2(a) Income Tax Regulations, Dreicer v. Commissioner, supra.

The determination of weather the requisite profit objective exists is to be resolved on the basis of all the surrounding facts and circumstances of the case. Section 1.183-2(b) Income Tax Regulations, Golanty v. Commissioner, 72 T.C. 411 (1979), affirmed without published opinion 647 F.2d 170 (9'th Circuit 1981).

Greater weight is to be given to the objective facts than to the taxpayer's mere statement of his intent. Section 1.183-2(a) Income Tax Regulations, Dreicer v. Commissioner, supra, at 645.

Section 1.183-2(b) Income Tax Regs provides a list of nine factors to use in determining weather an activity is engaged in for profit. These factors include,

one, the manner in which the taxpayer carried on the activity; two, the expertise of the taxpayer or his advisors; three, the time and effort expended by the taxpayer in carrying on the activity;

Four, the expectation that the assets used in the activity may appreciate in value; five, the success of the taxpayer in carrying out other similar or dissimilar activity; six, the taxpayer's history of income or losses with respect to the activity; seven, the amount of occasional profits if any which are earned; eight, the financial status of the taxpayer; and, nine, any elements indicating personal pleasure or recreation.

No one factor is conclusive in making this determination. Allen v. Commissioner, 72 T.C. 28 at 34 (1979).

Applying these factors to the case before us, we conclude that the petitioner's art activity was an activity not

engaged in for profit within the meaning of Section 183.

A review of the total record in this case leads us to the conclusion that petitioner's activity did not go beyond the mere hope of getting into the business of being a portrait painter.

The expenditures that were incurred were no different than those that might be incurred by any individual painting for personal pleasure. Petitioner did not incur any expense that was not associated with his personal use.

Petitioner's art studio was in his personal residence. His travel expenses including a sailing trip, visits to Europe and Florida, are customary places to travel for personal pleasure.

We do not believe that petitioner would travel to Europe or Florida for the primary purpose to obtain art materials or simply to learn more about the great

masters of art.

Petitioner has failed to show that his computer was purchased primarily for use in his art activity. Petitioner bears the burden of proof to show that he had an honest and actual objective of making a profit. Welch v. Helvering, 290 U.S. Ill (1933). On this record petitioner has failed to meet this burden.

Further, petitioner, has failed to show that he is entitled to a deduction for legal fees in excess of the amount allowed by respondent, the excise taxes paid on airline tickets, or the deduction claimed for auto tags.

Accordingly, respondent's determination for each of these years involved is sustained.

Petitioner also bears the burden of proof to show that respondent's determination that petitioner is liable for the additions to the tax set forth in the

notice of deficiency. Bixby v. Commissioner, 58 T.C. 757 at 791 (1972).

The record shows that petitioner claimed large deductions which were clearly not allowable. Petitioner failed to keep adequate records to support deductions claimed. Petitioner failed to seek professional help to determine whether he was properly computing his income and claiming deductions for such items as cost of goods sold, federal income taxes and travel expenses.

Negligence is lack of care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances. Neely v. Commissioner, 85 T.C. 934 at 947 (1985).

Under this standard and based on this record, the total underpayment of tax is due to negligence. Because there is substantial understatement of income tax for 1983 and 1984, the ten percent penalty

under section 6661 is applicable.

For reasons set forth above, a decision will be entered for respondent.

This concludes the Court's oral findings of fact and opinion in this case.

(Whereupon the matter was concluded.)

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

ROBERT SCOTT DUNNING,	)	
Petitioner,	)	
v.	)	Docket No.
	)	18206-87
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent	)	

DECISION

Pursuant to the determination of the Court, as set forth in its bench opinion rendered on November 18, 1987 at Richmond, Virginia, it is

ORDERED AND DECIDED that there are deficiencies and additions to tax as follows:

Year	Deficiency	Addition to Tax I.R.C. 1954 Sec.6653(a)(1)	Addition to Tax I.R.C. 1954 Sec.6653(a)(2)	Addition to Tax I.R.C. 1954 Sec.6661
1982	$3,949.25	$197.46	*	-------
1983	5,159.00	257.95	*	$515.90
1984	6,584.00	329.90	*	658.40

*50 percent of the interest due on the underpayments of $3,949.25, $5,159.00 and $6,584.00, respectively.

(Signed) Marvin F. Peterson

Special Trial Judge

Entered: Dec 23 1987

4. Notice of Appeal

filed with Appeals Court

APPEAL OF A DECISION

OF THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Mailed*
Dec 9 1988
U.S. Court of Appeals
Fourth Circuit

NOTICE OF APPEAL

ROBERT S. DUNNNG	)	
Appellant	)	
	)	Docket No.
v.	)	88 2074
	)	
Commissioner of the	)	
Internal Revenue	)	
Appellee	)	

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States

this Notice of Appeal from a Judgement of the Court of Appeals for the Fourth Circuit is herewith transmitted. The judgement in the above noted case was originally rendered on October 20, 1988 and a Petition for Reconsideration was denied on November 22, 1988. Petitioner does not believe that the Tax Court or the Appeals Court correctly applied the law in the above case.

The case before the Tax Court was an interpretation of INTERNAL REVENUE CODE 26 U.S.C., SECTION 183 and SECTION 162(a) (Internal Revenue Code of 1954 as added by Sec. 213(a)) dealing with the distinction between hobby losses and ordinary business losses in a business activity. In addition to the main issue in the case under section 183, interest and penalties under SECTIONS 6653 and 6661 were also disputed. Petitioner believes that the

Appeals Court, in upholding the decision of the Tax Court, rendered a decision in conflict with Article II, Section 3. of the Constitution of the United States and with the interpretation of that Article in a Decision of the Court of Appeals for the Washington Circuit in SEC v. Chenery Corp, 318 U.S. 80 (1943) and, also, in a recent reaffirmation of that Decision in Lanphear v. Prokop, (D.C. Cir. 1983). In this Decision, therefore, a conflict exists between Courts of Appeals which the Supreme Court of the United States needs to address.

Finally, this appeal is brought under Article III, Section 2. of the Constitution of the United States granting appellate jurisdiction to the Supreme Court with respect to cases brought in the lower federal courts.

December 8, 1988

Robert Scott Dunning
36 Adriatic Avenue
Hampton, Virginia 23664
Phone 850 1918 (Home)
865 4591 (Office)

Petitioner Appears Pro Se

*The Court of Appeals currently has no record of this document. Appellant certifies that it was timely mailed and submits copies of certified mailing receipts to both the Court of Appeals and Attorney for the IRS below. Replacement copies will be filed with the Court of Appeals.

P-545 961 967

RECEIPT FOR CERTIFIED MAIL

Mr. John Lit Gibson
U.S. Court of Appeals
4th & Main Streets
Richmond, Va. 23219

Motion to appeal

.45
.85
1.30

HAMPTON, VA
DEC
9
1988

P-545 961 968

RECEIPT FOR CERTIFIED MAIL

Mr. William S. Rose
P. O. Box 502
Washington, D.C. 20044

.45
.85
1.30

HAMPTON, VA RIVERDALE STA.
DEC
9
1988

PS Form 3800, June 1985

5. Notice of Appeal filed with Tax Court

(Omitted)

6. Copy of IRS regulations, U.S.C. 26 Section 183 as supplied to the Appeals Court by the Justice Department for the Commissioner. (Determination of intent to make a profit guidlines.)

APPENDIX A-6

INTERNAL REVENUE CODE 26 U.S.C.

Internal Revenue Code of 1954 (26 U.S.C.)
Section 183 [as added by Sec. 213(a), Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487]. ACTIVITIES NOT ENGAGED IN FOR PROFIT.

(a) [as amended by Sec. 5(a), Subchapter S Revision Act of 1982, Pub. L. No. 97-354 Stat. 1669] General Rule.--In the case of an activity not engaged in by an individual of an S corporation, if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed under under this chapter except as provided in this section.

(b) Deductions Allowable.--In the case of an activity not engaged in for profit to which subsection (a) applies, there shall be allowed--

(1) The deductions which would be allowable under this chapter for the taxable year without regard to whether or not such activity is engaged in for profit, and

(2) a deduction equal to the amount of the deductions which would be available under this chapter for the taxable year only if such activity were engaged in for profit, but only to the extent that the gross income derived from such activity for the taxable year exceeds

the deductions allowable by reason of paragraph (1).

(c) Activity not engaged in for profit defined.--For purposes of this section the term "activity not engaged in for profit" means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212.

(d) [as amended by Sec. 1906(b)(13), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520] Presumption.--If the gross income derived from an activity for 2 or more of the taxable years in the period of 5 consecutive taxable years which ends with the taxable year exceeds the deductions attributable to such activity (determined without regard to whether or not such activity is engaged in for profit), then, unless the Secretary establishes to the contrary, such activity shall be presumed for the purposes of this chapter for such taxable year to be an activity engaged in for profit. In the case of an activity which consists in major part of the breeding, training, showing, or racing of horses, the preceeding sentence shall be applied by substituting the period of 7 consecutive taxable years for the period of 5 consecutive taxable years.

(e) (1) [as added by Sec. 311(a), Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497] Special Rule-- In general--A determination as to whether the presumption provided by subsection (d) applies with respect to any activity shall, if the taxpayer so elects, not be made before the close of the fourth tax-

able year (sixth taxable year, in the case of an activity described in the last sentence of such subsection) following the taxable year in which the taxpayer first engages in the activity. For purposes of the preceeding sentence, a taxpayer shall be treated as not having engaged in an activity during any taxable year beginning before January 1, 1970.

(2) Initial Period.--If the taxpayer makes an election under paragraph (1), the presumption provided by subsection (d) shall apply to each taxable year in the 5-taxable year (or 7-taxable year) period beginning with the taxable year in which the taxpayer first engages in the activity, if the gross income derived from the activity for 2 or more of the taxable years in such period exceeds the deductions attributable to the activity (determined without regard to whether or not the activity is engaged in for profit).

(3) Election.--An election under paragraph (1) shall be made at such time and in such manner, and subject to such terms and conditions, as the secretary may prescribe.

(4) [as added by Sec. 214(a), Tax Reform Act of 1976, supra] Time for assessing deficiency attributable to activity.--If a taxpayer makes an election under paragraph (1) with respect to an activity, the statutory period for the assessment of any deficiency attributable to such activity shall not expire before the expiration of 2 years after the date prescribed by law (determined without extensions) for filing the return of tax under chapter 1 of the last taxable year in the period of 5 taxable years (or 7

taxable years) to which the election relates. Such deficiency may be assessed notwithstanding the provisions of any law or rule of law which would otherwise prevent such assessment.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

1.183-2 Activity not engaged in for profit defined.

(a) In general. For purposes of section 183 and the regulations thereunder, the term "activity not engaged in for profit" means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212. Deductions are allowable under section 162 for expenses of carrying on activities which constitute a trade or business of the taxpayer and under section 212 for expenses incurred in connection with activities engaged in for the production or collection of income or for the management, conservation, or maintainance of property held for the production of income. Except as provided in section 183 and 1.183, no deductions are allowable for the expenses incurred in connection with activities which were not engaged in for profit. Thus, for example, deductions are not allowable under section 162 or 212 for activities which are carried on primarily as a sport, hobby, or for recreation. The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances must

indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit. In determining whether such an objective exists, it may be sufficient that there is a small chance of making a large profit. Thus it may be found that an investor in a wildcat oil well who incurs very substantial expenditures is in the venture for profit even though the expectation of a profit might be considered unreasonable. In determining whether an activity is engaged in for profit, greater weight is given to objective facts than to the taxpayer's mere statement of his intent.

(b) Relevant factors. In determining whether an activity is engaged in for profit, all facts and circumstances with respect to the activity are to be taken into account. No one factor is determinative in making this determination. In addition, it is not intended that only the factors described in this paragraph are to be taken into account in making the determination, or that a determination is to be made on the basis that the number of factors (whether or not listed in this paragraph) indicating a lack of profit objective exceeds the number of factors indicating a profit objective, or vice versa. Among the factors which should normally be taken into account are the following:

(1) Manner in which the taxpayer carries on the activity. The fact that the taxpayer carries on the activity in a businesslike manner and maintains complete and accurate books and records may indicate that the activity is engaged in for profit. Similarly, where an activity is carried on in a manner substantially sim-

ilar to other activities of the same nature which are profitable, a profit motive may be indicated. A change of operating methods, adoption of new techniques or abandonment of unprofitable methods in a manner consistent with an intent to improve profitability may also indicate a profit motive.

(2) The expertise of the taxpayer or his advisors. Preparation for the activity by extensive study of its accepted business, economic and scientific practices, or consultation with those who are expert therein may indicate that the taxpayer has a profit motive where the taxpayer carries on the activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an that the taxpayer has a profit motive where the taxpayer carries on the activity in accordance with such practices. Where a taxpayer has such preparation or procures such expert advice, but does not carry on the activity in accordance with such practices, a lack of intent to derive a profit may be indicated unless it appears that the taxpayer is attempting to develop new or superior techniques which may result in profits from the activity.

(3) The time and effort expended by the taxpayer in carrying on the activity. The fact that the taxpayer devotes much of his personal time and effort to carrying on an activity, particularly if the activity does not have personal or recreational aspects, may indicate an intention to derive a profit. A taxpayer's withdrawal from another occupation to devote most of his energies to the activity may also be evidence that the activity is en-

gaged in for profit. The fact that the taxpayer devotes a limited amount of time to an activity does not necessarily indicate a lack of profit motive where the taxpayer employs competent and qualified persons to carry on such an activity.

(4) Expectation that the assets used in activity may appreciate in value. The term "profit" encompasses appreciation in the value of assets, such as land used in the activity. Thus the taxpayer may intend to derive a profit from the operation of the activity, and may also intend that, even if no profit from the current operations is derived, an overall profit will result when appreciation in the value of the land used in the activity is realized since income from the activity together with the appreciation of the land will exceed the expenses of the operation. See, however, paragraph (d) of 1.183-1 for definition of an activity in this connection.

(5) The success of the taxpayer in carrying on other similar or dissimilar activities. The fact that the taxpayer has engaged in similar activities in the past and converted them from unprofitable to profitable enterprises may indicate that he is engaged in the present activity for profit, even though the activity is presently unprofitable.

(6) The taxpayer's history of income or losses with respect to the activity. A series of losses during the initial, or start-up stages of an activity may not necessarily be an indication that the activity is not engaged in for profit. However, where losses continue to be sustained beyond the period which customarily

is necessary to bring the operation to profitable status such continued losses, if not explainable, as due to customary business risks or reverses may be indicative that the activity is not engaged in for profit. If the losses are sustained due to unforseen or fortuitous circumstances which are beyond the control of the taxpayer, such as drought, disease, fire theft, weather damages, other involuntary conversions, or depressed market conditions, such losses would not be an indication that the activity is not engaged in for profit. A series of years in which net income was realized would of course be strong evidence that the activity is engaged in for profit.

(7) The amount of occasional profits, if any, which are earned. The amount of profits in relation to the amount of losses incurred, and the relation to the amount of the taxpayer's investment and the value of the assets used in the activity, may provide useful criteria in determining the taxpayer's intent. An occasional small profit from an activity generating large losses, or from an activity in which the taxpayer has made a large investment, would not generally be determinative that the activity is engaged in for profit. However, substantial profit, though only occasional, would probably be indicative that the activity is engaged in for profit, where the investment or losses are comparatively small. Moreover, an opportunity to earn a substantial ultimate profit in a highly speculative venture is ordinarily sufficient to indicate that the activity is engaged in for profit even though losses or only occasional small profits are actually generated.

(8) The financial status of the taxpayer. The fact that the taxpayer does not have substantial income or capital from sources other than the activity may indicate that an activity is engaged in for profit. Substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit especially if there are personal or recreational elements involved.

(9) Elements of personal pleasure or recreation. The presence of personal motives in carrying on of an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or personal elements involved. On the other hand, a profit motivation may be indicated where an activity lacks any appeal other than profit. It is not, however, necessary that an activity be engaged in for the exclusive intention of deriving a profit or with the intention of maximizing profits. For example, the availability of other investments which would yield a higher return and which would be more likely to be profitable, is not evidence that an activity is not engaged in for profit. An activity will not be treated as not engaged in for profit merely because the taxpayer has purpose or motivations other than solely to make a profit. Also, the fact that the taxpayer derives personal pleasure from engaging in the activity is not sufficient to cause the activity to be classified as not engaged in for profit if the activity is in fact engaged in for profit as evidenced by other factors whether or not listed in this paragraph.